Supreme Court, U.S.
FILED

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No. _____

In the
SUPREME COURT of the UNITED STATES

MICHAEL M. KENNEDY,
Petitioner

v

GRATTAN TOWNSHIP, MICHIGAN,
et al, Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO CIRCUIT COURT OF APPEALS
FOR THE 6TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS

Private attorneys, acting under color of law as prosecutors with no jurisdiction, who conspired with a biased state judge and local officials, maliciously prosecuted petitioner in a state property rights v. zoning case. After exhausting all appeals, Petitioner filed this malicious prosecution civil rights case pro se. It was quickly dismissed on *Rooker-Feldman*, prosecutorial immunity and the state judge was dismissed *sua sponte* for alleged lack of service. Sanctions were awarded defendants. The appeal raised and briefed 15 questions, without a complete copy of the docket of the district court, and then was barred from filing a reply brief and appendix or copy of the record by the clerk. None of the questions were addressed. The panel affirmed on *res judicata* grounds - not raised before. Rehearing en banc was denied.

1. *Greenlaw v US* (07-330) held that appellants have the due process right to frame the issues for decision on appeal. Since none of the appellant's pro se questions were addressed and justice was denied, will this Court settle this conflict and decide whether pro se appellants have equal rights on appeal to those with attorneys? Does strict scrutiny apply since fundamental rights are at risk? Is *de novo* review of summary judgment of the record or the lower court decision?

2. Judges are supposed to be unbiased. Two of the court of appeals judges have served on many panels with the district court judge in this case over many years. Does that close association create a

substantial risk of bias in decisionmaking that could and did prevent justice from being served for the pro se appellant? Does strict scrutiny apply to review of bias issues?

3. *Imbler v Pachtman*, 424 US 409 (1976) held that public prosecutors are absolutely immune from liability for civil rights violations. In this malicious prosecution case lower courts have extended that immunity to for-profit private attorneys. Should the absolute prosecutorial immunity granted to private-for-profit attorneys acting under color of law in civil rights cases be reversed? And is malicious prosecution a civil rights violation?

4. Was the award of attorney fees without just cause? And if so was it retaliation for bringing suit against judges and lawyers or punitive and should strict scrutiny apply to attorney fees granted against pro se civil rights plaintiffs?

LIST OF PARTIES (Respondents)

Grattan Township
Lana Green
David Munson
Richard Herweyer
Paul Knoerl
Dennis Heffron
Steven R. Servaas
Ross Leisman
James Brown
Mika, Meyers, Beckett & Jones

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the 6th Circuit Court of Appeals appears at Appendix A, 1a. under separate cover. It is an unpublished decision. The motion for rehearing en banc was denied and appears at Appendix L, 52a. The opinion of the District Court on summary judgment appears at Appendix C, p 8a. The opinion of the District Court granting attorney fees appears at Appendix H, 37 a. The magistrate's report and recommendation for summary judgment appears at Appendix E, 18a. The magistrate's report and recommendation for attorney fees appears at Appendix I, 40a.

JURISDICTION

The jurisdiction of this Court rests in 28 USC 1254. The Court of Appeals decision was filed March 26, 2008. (App A, 1a) Rehearing en banc was denied on August 26, 2008. (App L, 52a) Extension of time was granted by Justice Stevens to and including January 23, 2009. (App M, 53a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (Michigan Constitution parallel part Art. I, sec 23)

Fourteenth Amendment
(relevant part)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC 453 Oath of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

28 USC 455 Disqualification of justice, judge or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, . . (relevant part)

28 USC 1654 Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by

counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Michigan Constitution Article VII sec 4

There shall be *elected* for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a *prosecuting attorney*, whose duties and powers shall be provided by law." (In relevant part.) (emphasis added)

STATEMENT OF THE CASE

This civil rights case under 42 USC 1983 and 1985 involves persons and a state subdivision involved in two state cases, one that was a malicious prosecution without jurisdiction and the other a Freedom of Information Act (FOIA) case brought by Petitioner.

The State cases

Petitioner owns and has long lived on a dirt road on about 50 acres of woods and farmland in rural Grattan Township, Kent County, Michigan where he has exercised his Freedoms and Liberties of property ownership enjoyed by our Forefathers and guaranteed by the Constitution. This included having many vehicles of different types from farm equipment, to semi trucks and trailers, used in his work as a truck driver, to recreational vehicles, trailers, collectable cars and others he repaired.

The Township allegedly passed in 1973 zoning Ordinance 1 that prohibited the storing of unlicensed and uninsured vehicles outside of buildings. Petitioner was charged with said offense and prosecuted. Multiple violations of Petitioner's civil rights resulted. Respondents were so desperate to convict they hired

an airplane and took pictures of the property for evidence. Their official was not authorized by law and not taken an oath.

The prosecution was by private practice lawyers and law firm hourly hired by the Township and biased in its favor and favored by the judge. Unbeknown to Petitioner the prosecutors had one or more *ex parte* conferences with Judge Servaas without the Petitioner's knowledge shortly after the charge was filed in 2001 (grounds for new trial under *US v Minsky*, 953 F2d 870 (6th Cir 1992)).

The lawyers and the Township defendants deliberately withheld exculpatory evidence of lack of valid ordinance, thus lack of jurisdiction, and lack of oath of the official pressing charges in violation of *Brady v Maryland* until long after the trial.

Petitioner attempted to represent himself, but he was unjustly threatened with contempt and then later jailed for 4 days for defending himself. He was also fined $250 for the alleged contempt by the biased judge, who never identified the contempt - which could only be free speech arguing for a jury trial, since the ordinance said it was a misdemeanor. (Mich. Const. Art. 1 sec 17; 6th Am. 7th Am.) Petitioner then hired two lawyers from outside the county that were not favored by the judge.

They filed a Freedom of Information case to secure information withheld by defendants and won, but not until after Petitioner was convicted and was ordered, without authority, to remove the vehicles from his property or license and insure them or place them in buildings. (The FOIA case ultimately discovered after the trial that the Township had never enacted its ordinance in accord with state law by

publication and was therefore invalid and the official did not have an oath of office.)

The Township repealed Ordinance 1 about a month before the trial. Petitioner's attorneys then moved to dismiss based on the repeal of Ord. 1 before the trial. Respondents falsely claimed it had not been repealed. Judge Servaas refused to allow the motion to be heard on the day of trial even though it was scheduled for then. He then substituted witnesses and had others sign the ticket in order to attempt to make it valid. He then convicted Petitioner knowing the ordinance was likely repealed and without regard for lack of jurisdiction of a valid ordinance.

The order was deceptively written by the Township attorneys. Petitioner's attorney attempted to contest it, but the Judge signed it with out the required due process of allowing a hearing to resolve differences, which was scheduled.

At sentencing Petitioner was coerced by the Judge to agree to pay all attorney fees, but refused. Thus he was fined $500 and ordered to pay $500 costs (attorney fees) and remove all the vehicles and be inspected.

In the mean time the FOIA case was decided and an order issued to Defendants to reveal the information demanded. The information was received long after the finding of guilt. It revealed that the official had no oath of office and revealed Ordinance 1 had never been published and thus violated State law and means that jurisdiction was lacking from day one. The Township was ordered to pay $1400 in attorney fees in the Freedom of Information case for unlawfully withholding information.

Petitioner pro se appealed by right from the state district court to the local circuit court. The newly elected judge refused to reverse. The alleged prosecutors lied to the appellate court and subsequent courts and the appeal was unsuccessful.

Grattan by defendant attorneys filed a cross appeal, but then withdrew the appeal and moved for attorney fees at the trial court. Without any jurisdiction, since the appeal had been filed, or authority the judge ordered Petitioner to pay attorney fees to the Township in the amount of $5,000 for the Township's alleged prosecution costs. Later without due process Petitioner was found to be in criminal contempt for not paying the attorney fees and a warrant may have been issued for his arrest.

On appeal the attorneys falsely contended the ordinance was not repealed because it was not published and the Judge believed them. Petitioner later found evidence it had been published. Without a valid ordinance there was no jurisdiction or authority to prosecute Petitioner.

After the appeal Petitioner discovered the trial judge had a secret *ex parte* conference with attorneys for the Township at the beginning of the case. Furthermore he discovered evidence that the attorney for the Township had lied to the circuit court. These and *Brady* issues were raised in the short 21 days allowed to appeal *by leave* to the Michigan Court of Appeals (MCA). But these discretionary appeals to the MCA and Supreme Court were not accepted. This Court refused to grant certiorari. Pet #05-953.

The Federal case

Petitioner then filed this 42 USC 1983 and 1985 suit alleging violations of his civil rights - taking his property, malicious prosecution, harassment, *Brady* violations, unauthorized prosecutors, biased judge, conspiracy and other challenges - seeking money damages in excess of $75,000, jury trial, declaratory and injunctive relief. The defendants were sued in their individual and officials capacities.

The state judge was served by waiver at his court under Rule 4, but never responded. Where the judge lived at the time is not certain according to state judicial tenure authorities. He was also served later by certified mail at the court and receipt was received. All other defendants were served personally and responded. The state judge never appeared or responded to the complaint served by waiver and was dismissed *sua sponte* by the biased district court judge who knows, sits in the same county with and is likely friends with, the long sitting popular state Judge Servaas. (App C, 13a) This judge was listed as an appellee on the notice of appeal, but was deleted by the clerk without reason or notice. (A favor to the district court judge - his friend - from his other friend, the clerk?)

The magistrate briefly summarized some of the issues of the complaint related to the above civil rights violations. (App E, 18a-19a) The attorney defendants filed a hybrid motion for dismissal - summary judgment. (App E, 20a) Discovery was barred by the magistrate and plaintiff had to resist motions to dismiss and summary judgment in a very short time. (App K, 51a; F, 32a) (The magistrate falsely asserts

intent to extend time for discovery when there was none.)

In this "new era of summary judgment practice" the magistrate claims it is his supreme duty to "weed out fanciful, malicious, and unsupported claims before trial." (App E, 18a)

He recommended the case be dismissed on prosecutorial immunity - primarily in reliance on 6th Cir cases without discussing any opposing arguments that the attorneys are not valid prosecutors or deserving of immunity. (App E, 24a-27a) He also found *Rooker-Feldman* and collateral estoppel applied and recommended attorney fees be granted. (App E, 27a-30a) Petitioner objected. The Township filed for summary judgment about the same time, likely using the magistrates opinion as guidance.

The judge granted summary judgment to the alleged prosecutors on immunity grounds even though they are not authorized by the State Constitution, do not live in the Township, are not elected and are biased by being hourly paid by the Township and are clearly not interested in justice. The court never decided if Petitioner's constitutional rights were violated as is required in summary judgment cases and never considered the substantial and controlling opposing evidence. The attorneys and Township defendants were unjustly granted summary judgment on lack of jurisdiction citing *Rooker-Feldman*. (App C, 8a) In neither instance did the court consider or discuss Petitioners opposing arguments or challenges or the record evidence. Defendants were clearly *not* "entitled to judgment as a matter of law." The evidence of record proved Petitioner should have been granted summary judgment for clear violations of civil rights together

with case law. Petitioner had no chance to amend his complaint, but sought to reserve the right.

Petitioner believes the attorney fees were in retaliation for suing a judge and attorneys. The attorney fee sanctions of $4,830 and $3,688 were awarded Defendants under guise and false allegations the complaint was frivolous - with no evidence thereof. (App E, 29a; C, 14a) The award of specific attorney fees took place *after* Petitioner had filed to appeal because of the time limitations by law. (App J, 41a; H, 37a) (Petitioner believes the judge deliberately waited past the 30 days to appeal in hopes he would wait also and lose the right to appeal the primary decision because of untimeliness.)

Petitioner believes the record reveals the federal judge and magistrate are biased against pro se Petitioner and in favor of defendants, as in other pro se cases. Evidence thereof is the refusal to find many facts in favor of the nonmovant and refusal to even mention Petitioner's 3 affidavits and substantial evidence submitted, plus the award of attorney fees. In addition, Petitioner submitted substantial evidence to the record that the state court prosecution was neither fair nor full and was filled with the errors and civil rights violations listed above, but the district court and magistrate refused to acknowledge any of this evidence and attempted to cover it all up by falsely asserting the opposite. (App C, 12a "[P]laintiff argues that he did not have a full and fair opportunity to litigate these issues in the state courts.") It is extremely easy for a judge to say it was full and fair when he chooses to ignore the truth and the evidence. One cannot present all the evidence of deliberate errors on appeal and have any space to argue the other issues.

On appeal to the 6th Circuit Petitioner was denied a complete copy of the lower court docket sheets including entries concerning attorney fees, the right to have that docket before his reply brief was filed and an extension of time to file the reply brief and copies of the record by the court clerk. (App B, 7a)

On appeal by right *none* of the 15 questions raised by defendant were addressed or answered by the panel in violation of *Greenlaw v US* (07-330)(2008). They did not address *Rooker-Feldman* or any argument made by Appellant. Instead they affirmed on *res judicata* grounds, an issue never raised below, briefed or ruled on and only mentioned in Appellees' brief – to which Petitioner was not allowed to respond by the clerk. The case was *not* reviewed *de novo* as required by law, nor were any of the facts viewed in Petitioners favor. It is doubtful the record was even available. Petitioner has no evidence it was sent and he was prevented from sending copies as he intended. (Petitioner sought to secure the docket via superintending control application to Justice Stevens, but it was misplaced.) They also refused to consider Petitioner's arguments and evidence against prosecutorial immunity that proved these were not authorized prosecutors according to the Michigan Constitution and were biased by being hourly paid private attorneys. They affirmed sanctions for attorney fees without addressing any issue raised in opposition. The clerk refused to provide a copy of the court of appeals docket when twice requested. (App A, 1a)

On motion for rehearing en banc Petitioner raised 7 questions (although he forgot to put the questions in, but they could be deduced from the paragraph headings). Further he moved to disqualify

all of the judges who had sat on panels with the district court judge or knew him personally, a large number. Appellant also requested that superintending control be exercised over the clerk to compel him to provide copies of the docket sheets, as is his duty. But rehearing was denied.

All of the facts presented here are confirmed by the record.

REASONS FOR GRANTING THE PETITION

I.

THE 6TH CIRCUIT REFUSED TO ANSWER ANY OF THE QUESTIONS OF THE PRO SE APPELLANT. IT HAS DONE THAT TO OTHER PRO SE LITIGANTS. RESOLVING THIS CONFLICT IS NECESSARY TO JUSTICE.

Greenlaw v US, (07-330)(2008) is a landmark case for pro se litigants even though it did not involve one. Why? Pro se litigants have for many long years been denied due process on appeal, as this case clearly demonstrates.

Very few cases have set out the specific rights and process due appellants by law and no statute specifies them. Therefore, pro se litigants have been unable to find justice when the appellate courts discriminate against them. For pro se litigants this has been a huge problem. They usually are not heard on appeal, just as they are not fully, fairly and truthfully heard in the district courts and state courts. This question has been raised before, but not addressed as shall be seen below.

Greenlaw held:

"In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, *we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present*. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights. See *Castro v US*, 540 US 375, 381-383 (2003)." *Id.* p 5. (emphasis added)

Petitioner presented 15 questions on appeal and briefed them, but not one was addressed. The present case demonstrates clearly that what *Greenlaw* says is the law of due process on appeal is not true for pro se appellants in the 6th Circuit. Their intent has not been to "protect a pro se litigant." *Id.* Exactly the contrary - to make sure he and other pro se litigants do not win or even get a hearing, let alone a fair one. Thousands of pro se litigants have lost their rights to enforce civil rights laws in this Circuit.

The case of *Dred Scott v Sanford*, 60 US 393, 428 (1857) held:

> [I]t is not only the right, but it is the judicial duty of the court, to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment, and remand the case.

The Court needs to confront this conflict between law and practice of the court of appeals and protect pro se litigants, a protected class by law.

Appellant's questions presented pro se were deliberately not addressed by the court of appeals panel in order to affirm the judgment below.

Petitioner timely appealed, filed a brief with 15 questions and each was adequately briefed and provided compelling reasons to reverse summary judgment according to the grounds decided by the district court.

A review of the questions and comparison to the opinion of the appellate panel proves clearly that they did not address any one. In fact it is doubtful they read the brief.

The questions are quoted as follows: (bracketed portions added afterward for clarity)

(6th Cir Appeal)
QUESTIONS PRESENTED

1. Whether Plaintiff's constitutional rights, right to due process of law and to his day in [federal] court, was adversely affected by the absence of 3 judges from the 4 judge district court by having the one overloaded judge decide the case?

2. Was Defendant Judge Servaas incorrectly dismissed [sua sponte] for lack of service when the record shows he was served with waiver of service and [by] certified mail, but never responded?

3. Did the state judge's ex parte conference with prosecutor alone create bias sufficient to violate 28 USC 144, 453, 455 and/or rulings of the Supreme Court

requiring an impartial decisionmaker? If so, is that bias sufficient to void the state court judgment? If not, would it be considering all the other bias and prejudicial rulings? Alternatively, did the *ex parte* conference with evidence from the record show sufficient bias to be disqualified from hearing the case?

4. Whether the private for profit hourly paid attorneys acting as prosecutors in the state case, without state constitutional authority, who conspired with the judge and local government officials, withheld exculpatory evidence [in violation of Brady v Maryland – that the ordinance had never been enacted lawfully and withheld evidence that it had been repealed and lied about it on appeal claiming it had not been repealed] and prosecuted otherwise without jurisdiction are within the scope of prosecutors deserving immunity envisioned in *Imbler v Pachtman*, 424 US 409 (1976), [regardless of the contrary holdings of] the constitution and other decisions of the Supreme Court, sufficient to avoid civil rights liability?

5. Is the state statute that pretends to offer immunity to state officials unconstitutional because it is contrary to state and federal authorities?

6. Does the award of attorney fees in this case at the district court pursuant to 42 USC 1988 conflict with the intent of the First Amendment right to petition for redress of grievances and/or the 14th Amendment right to enforce Constitutional rights against the states and their agents and [/or alternatively] lack authority there in?

7. In award of attorney fees under 42 USC 1988, is there sufficient evidence in the record of frivolousness, if any, to survive strict scrutiny?

8. Whether attorney fees imposed by the state in an alleged zoning enforcement action is in violation of the common law or other rights citizens have?

9. Does the Rooker/Feldman doctrine applied in this case as a bar to jurisdiction of this civil rights action under 42 USC 1983, 1985 and 1988 squarely conflict with the intent of the People and Congress in enacting the 14th Amendment and the subsequent enforcement statutes enacted by Congress under the 5th section thereof?

10. Does *Rooker-Feldman* bar federal DC jurisdiction when the states highest court denied review and if so, does it deny review when the US Supreme Court also denied review, as in [the prior related state] this case?

11. Does *Rooker-Feldman* unjustly negate the First Amendment rights of federal plaintiffs who have been victims of state judicial civil rights violations?

12. Does collateral estoppel or 28 USC 1738 absolutely bar jurisdiction of a federal district court in a civil rights action seeking collateral review just because a state court has ruled on an issue related to the civil rights action or, alternatively, did the 14th Amendment deliberately open state actions for lower court federal review to insure adherence to federal rights in state cases?

13. Whether the civil rights conspiracy statute, 42 USC 1985, may be enforced in conjunction with 42 USC 1983 to enforce the civil rights liability in accord with the 14th Amendment's protected rights [where private attorneys conspired with public officials] and [if not] whether Plaintiff is allowed to amend the complaint to include section 2 to correct an

inadvertent error of omission regarding the conspiracy charge under 42 USC 1985?

14. Does the Michigan practice of allowing attorneys to write judicial orders violate the [US] Constitution?

15. Whether Township Ordinance 1 is in effect a seizure of private property in violation of the Constitution and of Appellant's rights?

Both the Township Defendants and Attorney Defendants filed opposing briefs, but mostly did not even address the questions raised by Appellant.

One of the two raised for the first time the issue of *res judicata* in a small section of the brief. *Res judicata* had never been raised at the district court. Guess what? The court of appeals adopted that as the ruling of the court to affirm.

Both appellees referenced district court documents related to attorney fees orders in excess of # 50, which is the last one on the docket sheets Appellant had. So he went to court and purchased a second copy, but it was identical. Appellant then requested the Court of Appeals clerk provide the correct docket sheets. They refused. In fact they also refused to provide a copy of their docket when requested by phone and by mail. Appellant needed a correct docket sheet to correctly reference filings by number for his reply brief and the appendix. He requested an extension of time to secure the docket and make these filings. Instead, he was sent a couple of notices by the clerk rejecting his request. (See App B 7a) Appellant still does not have correct docket sheets of the district court and does not have any from the 6th Cir., even though it has been requested twice.

They refused to allow time for a reply brief and contended the case would be decided on the record. But Petitioner was never noticed that the record was sent and doubts to this day that it was.

The 6th Circuit panel adopted *res judicata* as grounds to affirm. (App A, 3a) They deliberately avoided *Rooker-Feldman* because it was defeated.

Review is necessary to protect pro se litigants rights, which are also protected by the Constitution and federal law, and to insure they have rights equal to attorney represented litigants on appeal.

The First Amendment protects the right to "petition" for redress of grievances - a right of pro se litigants which should be equal to the rights of those with attorneys.

The 14th Amendment protects privileges and immunities - which includes the right to speak for oneself in court. The Equal protection clause protects the liberty of going to court for oneself and the rights thereof so they are at least equal to those of attorney represented appellants.

Congress has protected the right to be in court pro se by recognizing the old long established common law right to represent yourself in court. 28 USC 1654.

The Supreme Court has wisely protected pro se rights in some cases. *Haines v Kerner*, 404 US 519 (1972); *Farretta v California*, 422 US 806 (1975); *McKaskle v Wiggins*, 465 US 168 (1984). *In re Little*, 404 US 553 (1972) the petitioner was forced to represent himself by a state judge and then found in contempt for stating the judge was biased.

> "[I]t is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, *will be protected by appellate courts when infringed by trial courts.*" *Sacher v US*, 343 US 1, 9 (1952). (emphasis added)

But here in the 6th Circuit Court of Appeals Appellant was not able to have his questions answered so he could reverse summary judgment and recover his civil rights case. Thus his Equal Protection and other rights listed above have been violated.

Consider a prior pro se petition seeking review of this very question.

Other pro se litigants have been denied their due process rights on appeal by not having their questions answered.

It is from the same district court - the Western District of Michigan - and in the 6th Circuit. On Petition to this Court essentially the same question was presented for review when the 6th Circuit refused to answer the pro se appellants questions and instead affirmed on irrelevant grounds it picked. See *Luther v Burton*, (Pet. #02-343) (6th Cir #01-2232) (Luther charged Burton, a probation officer, violated his civil rights when he persuaded and conspired with a judge to bar Luther from Kent County for 14 months with a probation order, and, therefore, from seeing Luther's children and living where he wanted to.) That civil rights question was:

"1. Whether pro se litigants as a protected class under 28 USC 1654 enforcing Constitutional rights under 42 USC 1983 *have a constitutional right to have the questions they raise on appeal fully and fairly addressed and decided on the merits* before affirmance and preclusion doctrines are applied and their rights lost?" (emphasis added)

The 6th Circuit stated in their order on appeal:

"In his timely appeal, Luther argues that: (1) he was denied discovery; (2) the district court judge was biased against him; (3) Burton's actions constituted "triple jeopardy;" and (4) Burton was not entitled to qualified immunity." (*Luther*, App p 2)

But on par the panel refused to answer any question. Instead they concluded:

"Luther did not counter that proof. In sum, Luther failed to present evidence on which a jury could reasonably find for him and against Kent County and Burton."

The truth is the appeal was a farce. It was pay your money three times, slam the door shut three times and that is all the due process you get. They were deliberately indifferent to the fact Luther did not have any discovery to counter the allegations. They violated his fundamental right to a jury trial. (7th Am.) They told him to flush his civil rights on appeal.

Obviously, the problem has not gone away. But in the mean time how many pro se litigants have come

to the 6th Circuit, or one of the others, and been repeatedly denied justice on appeal, like they have been in state courts? Is it error or deliberate? (This Court does not correct errors. Rule 10.) Pro se litigants know it is not error. It is flat out prejudice.

Discriminating against pro se appellants does not have the appearance of justice.

The burdens of appeal for a pro se appellant are substantial in time, energy and court requirements, plus costs. This burden would not have been Petitioner's if the lower court had been just. But to now also deny a fair hearing on the merits of his appeal does not have any "appearance of justice" at all. *Aetna Life v Lavoie*, 475 US 813, 827-828 (1986).

II.

REASONABLE PERSONS COULD CONCLUDE THAT JUDGES HAVING CLOSE ASSOCIATIONS WITH EACH OTHER ARE BIASED IN FAVOR OF EACH OTHER AND THEREFORE SHOULD BE DISQUALIFIED.

Petitioner is solidly convinced that the Court of Appeals judges are biased in favor of the District Court judge and, therefore, Defendants, one of who is also a judge, and are biased against pro se litigants as a class and him specifically in this case.

The lower court judge in this case is Robert Holmes Bell. (See App C, 8a) The 6th Circuit judges are Judges Kennedy, Batchelder, and Griffin. (App A, 1a) The first two served with Judge Bell by appointment on numerous panels, some of which are listed below. Judge Griffin served on the Michigan Court of Appeals that covers much of the same area as the Western District of Michigan for many years and no doubt has

long known Judge Bell and possibly has been a bar member with him and had other associations.

Petitioner contends these relationships and associations between these judges have created an unconstitutional bias in favor of Judge Bell and against his appellate and constitutional enforcement rights and interests. The bias is more obvious in other parts of this petition. It is not the goal in this section to prove bias, but to argue its great probability. If it is reasonably probable, it is unconstitutional and in violation of the intent of Congress. (See 28 USC 453 & 455)

For the most part the judicial branch is unregulated, unhindered and almost unlimited. In the wrong hands it is damaging to civil rights, as in this case and the state case before it.

"There is probably no governmental power that may not be exerted to the injury of the public." *Champion v Ames*, 188 US 321, 363 (1903) The judicial power has injured the Petitioner in this case. The judicial power of injury to *pro se* litigants has not often been considered, if ever. Petitioner asks that it be considered in this case. The injury is judicial bias against a pro se litigant (not just one, but many). The state case was filled with judicial bias against Petitioner, as is the federal case.

Petitioner on rehearing en banc moved to disqualify all judges who had sat on a panel with the District Court judge or who knew him. Not one did.

Consider these facts concerning the district court judge serving with the court of appeals judges.

Judge Kennedy with District Judge Bell on 6th Cir panels.

Todd v Stegal, (00-22-3) 40 Fed Appx 25 (4-12-02)

Arrambide v Wal-Mart Stores, Inc.,
33 Fed Appx 199 (4-4-02)
El-Nobani v US, 287 F.3d 417 (4-4-02)
US v Ali, 38 Fed Appx 220 (3-26-02)
US v Hawins, 31 Fed Appx 304 (3-25-02)
Detroit Typo. Union v Detroit News,
283 F.3d 779 (1-23-02)
US v Colbert, 55 Fed Appx 225 (2-12-02)
Cowan v Paul Revere Life, 30 Fed Appx 384 (2-11-02)
Zobel v Tate, 36 Fed Appx 772 (2-11-02)
Idusuyi v Tenn. Dept., Child Serv.,
30 Fed Appx 398 (2-11-02)
Mullins v Toyota Motor Mfg., 28 Fed Appx 479
(1-19-02) (pro se)
Marbly v Mayor of Southfield,
26 Fed Appx 536 (1-28-02) (pro se barred from filing civil rights suits)
Wilson v Wilkinson, 28 Fed Appx 465 (1-28-02)(pro se)
Dorsey v Wal-Mart, 28 Fed Appx 468 (1-28-02) (pro se)
Johnson v Lockheed Martin Energy Sys.,
26 Fed Appx 537 (1-28-02)(pro se sj)
US v Gulley, 29 Fed Appx 228 (1-25-02)
Warren v Doe, 28 Fed Appx 463 (1-25-02)
(denied transcripts)
Thomas v Pleasant, 28 Fed Appx 436 (1-24-02)
(denied transcripts)
US v McClellan, 30 Fed Appx 340 (1-24-02)

Judge Batchelder and District Judge Bell on 6th Cir panels

US v Funk, 534 F.3d 522 (7-22-08)
US v Funk, 477 F.3d 421 (2-22-07)
Qeraxhiu v Gonzales, 206 Fed Appx 476 (11-15-06)
US v Washington, 199 Fed Appx 521 (10-10-06)

US v Whitmore, 193 Fed Appx 568 (8-25-06)
US v Griffith, 193 Fed Appx 538 (8-24-06)
US v Wagner, 193 Fed Appx 463 (8-23-06)
US v Morris, 193 Fed Appx 475 (8-23-06)
Abdallah v Gozales, 193 Fed Appx 408 (8-22-06)
Hughes v Sanders, (05-3945) (date ?)
Ky. Rest. Concepts Inc. v City of Louisville,
110 Fed Appx 678 (10-6-04);
Nixon v Belmont-Harrison Juvenile Dist.,
113 Fed Appx 51 (9-7-04)
Trollinger v Tyson Foods, 370 F.3d 602 (12-11-03)
Coomer v Bethesda Hosp., Inc. 370 F.3d 499 (12-17-03)
Jeffrey Chain v Topodyne Corp.,
93 Fed Appx 880 (3-31-04)
Dietz v Sanders, 100 Fed Appx 334 (3-31-04)
US v Thompson, 361 F.3d 918 (12-11-03)
Kriegish v Lipan, 97 Fed Appx 4, (2-23-04)
US v Soyk, 85 Fed Appx 448 (12-22-03)
Micakovic v Ashcroft, 85 Fed Appx 424, (12-16-03)
US v Cordell, 87 Fed Appx 475 (12-16-03)
US v Stotts, 84 Fed Appx 607 (12-15-03)
People v Jones, 84 Fed Appx 602 (12-15-03)
Cummings v US, 84 Fed Appx 603 (12-15-03)
Whittaker v US, 84 Fed Appx 609 (12-15-03)
Fed. Express Corp. v Hodges,
85 Fed Appx 412 (12-15-03)
Marasevic v INS. 86 Fed Appx 817 (12-15-03)
US v Lasley, 84 Fed Appx 617 (12-5-03)
Carr v Sweeny, Inc., 84 Fed Appx 633 (12-15-03)
Bilderbeck v US, 101 Fed Appx 569 (12-12-03)
Page v Metro Sewer Dist., 84 Fed Appx 583 (12-12-03)
Kennedy v Comm'r of SS, 87 Fed Appx 464 (12-12-03)
US v Medley, 85 Fed Appx 410 (12-12-03)

Note also that Judge Bell sat on panels before Judge Batchelder was appointed to the Court of Appeals in 1991. He sat panels in the following cases where Batchelder was the district judge whose case was being appealed.
US v Clark, 928 F.2d 733 (3-21-91)
US v Razsi, 897 F.2d 530 (3-5-90)

In 1991 Batchelder sat on a case where Bell was the district judge being appealed from. *Carlton v La Forrest*, (91-2025) (1-27-92) (a prisoner charged that corrections officer interfered with his access to court and mail. Bell ruled that because the prisoner had not *timely* objected to the magistrate's recommendation he lost his right to appeal.) (Note the time to object to a magistrate is only 10 days. That is hardly enough time for a prisoner to even get the mail let alone respond when the guards are messing with him and his mail to an undetermined extent.)

Note that Judge Bell was sitting on this case decided on March 26, 2008. The *Funk* 6th Cir case above was decided shortly thereafter on July 22, 2008. Note also that the first *Funk* case was decided February 22, 2007. Then note the Index of Appendices and the dates there relative to the magistrate and district court judge decisions in the same time frame of 2007. Did the judge give a head's up to his friends at the court of appeals, judges and clerks office, that a "bad one" is coming?

The test that needs to be applied is did the court of appeals display a "deep seated favoritism" for the lower court judge (and possibly for Defendant lawyers, state judge and public officials) and against pro se plaintiff that made "fair judgment impossible" *Liteky v*

US, 510 US 540, 555 (1994) and, if so, should they have disqualified themselves?

A second test should also be applied. Did the Court of Appeals make a detailed *de novo* review of the record, including appellant's brief and filings and come to the correct conclusion a reasonable neutral decisionmaker would find?

The rules for recusal are clear and well established. "A judge *must* recuse himself 'in any proceeding in which his impartiality might reasonably be questioned' or where 'he has a personal bias or prejudice concerning a party. 28 USC 455 (a), (b)." (emphasis added) *US v Arhebaman*, 04-1462, (6th Cir 2006 unpublished) p 5. See 28 USC 144, 453, 455.

The question in this case is not "bias . . . concerning (only) a party." There is prejudice for the Defendant lawyers, judge and local government. But there is also substantial prejudice in favor of the lower court judge. The issue is, assuming prejudice by association, whether an appellate judge having a personal bias for a lower court judge must disqualify him or herself. According to the same lower court, an "association" can be grounds for disqualification.

> "Disqualification must be based 'upon extrajudicial conduct rather than on judicial conduct' and upon a 'personal bias as distinguished from [a] judicial one, arising out of the judge's background and association and not from the judge's view of the law.' *Green v Nevers*, 111 F.3d 1295, 1303-04 (6th Cir 1997) (internal quotations and citations omitted.)" *Id.* p 5.

Apparently according to the above court even a severe "judicial" bias is not grounds for recusal. That seems to conflict with *Likety v US*, 510 US 540 (1994).

Petitioner believes the record and decision proves that the court of appeals panel displayed a "deep seated favoritism" for the lower court judge, whom they had sat on many panels with before, and that made "fair judgment impossible" for the pro se appellant. *Liteky v US*, 510 US 540, 555 (1994) The panel judges should therefore have disqualified themselves.

Petitioner on rehearing en banc moved to disqualify all judges who had sat on a panel with the District Court judge or who knew him. Not one did. Not one voted to rehear the case. But neither did they mention the motion. (See App L, 52a) The panel recorded a whopper, contending they had already considered the 7 questions raised when they knew full well they had not considered any of them.

Petitioner does not recall this Court deciding any case of bias against pro se litigants. Bias in favor of a judge is bias against the pro se appellant in this case. Judicial bias against pro se litigants is common. It happens all the time in courts, state and federal. But it is unconstitutional violating both the First and Fourteenth Amendment and 28 USC 1654, 453, and 455.

For these reasons strict scrutiny should be applied on review of the court of appeals decision, the clerk's decisions and the en banc decision.

The lower court held it did not have jurisdiction to decide the case because of *Rooker/Feldman*. The famous (infamous with Petitioner and other civil rights plaintiffs) *Rooker v Fidelity Trust*, 263 US 413, 44 S Ct 149, 68 L Ed 362 (1923) case was only decided on

motion to dismiss. But one of the few issues raised was the bias of the state judge who became trustee of large amounts of stock related to the trust party as a result of the death of the owner. The court (mistakenly?) held that the judge *did not* have a "disqualifying interest in the case" and granted the motion to dismiss. (Petitioner has heard that having one share of stock in a company whose case is before the court is sufficient for disqualification of a judge. See also 28 USC 455 (b)(4)).

The Court is virtually the only branch that can decide whether these associations are harmful to the cause of JUSTICE. It can only be decided in the context of a case. This case has all that is necessary to decide the issue and is ripe for review.

III.
PROSECUTORIAL IMMUNITY FOR PRIVATE FOR-PROFIT ATTORNEYS IS RIPE FOR REVIEW AND SHOULD BE REVERSED.

In regard to the prosecutors and other defendants in this case the magistrate noted correctly *"Plaintiff* then asserts his belief that he *was the victim of a conspiracy and retaliation in the state courts."* (emphasis added) (App F, 34a) The malicious prosecution by the Township and its private for-profit attorneys who prosecuted him without regard for his civil rights and jurisdiction are responsible and liable for their acts. Private persons acting under color of law are liable for civil rights violations. *Soldal v Cook County,* 506 US 56 (1992) The Court has not granted immunity to private civil rights violators that Petitioner is aware of and neither has Congress.

"There is, of course, quite a difference in the relationship between law partners and associates

> in private law firms and lawyers representing the government." *US v Caggiano*, 660 F.2d 184, 190 (6th Cir 1981)

Only this Court can decide whether for-profit private attorneys receive absolute prosecutorial immunity, as the lower courts ruled. It is an extremely important issue the Court should decide because it appears to conflict with this Court's prosecutorial immunity and other related rulings. There is no dispute that the attorneys are private practice attorneys paid hourly by the Township. The evidence is in the record.

Review of the *Imbler Pachtman* decision.

Five members of this Court held in *Imbler* v *Pachtman*, 424 US 409 (1976) that prosecutors within narrow limits were absolutely immune from damages liability in civil rights actions authorized by the 14th Am.

> "We hold *only* that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under sec 1983." *Id.* at 431. (emphasis added)

But Justice White with two other judges concurring in the judgment held that *no immunity should be extended to a prosecutor that withholds evidence*, as is true in this case. *Imbler*, at 433. (It also violates Michigan Rules of Professional Conduct (MRPC) 3.4(a) in addition to *Brady v Maryland*, 373 US 83 (1963).)

They also correctly noted that "there is no language in 42 USC 1983 extending *any* immunity to any state officials . . ." *Id.* at 434. (emphasis original) Therefore, all immunity is court created, not legislatively created, and therefore should be subjected to strict scrutiny, since it crosses the line of separation

of powers. At the very least the burden of proof necessary to secure the immunity should be carried by the party seeking it.

Even the *Imbler* majority believed that prosecutors should be prosecuted for withholding evidence. See *Id.* at fn) (Michigan rarely prosecutes any attorney and would never prosecute one on the complaint of a pro se litigant. They will *not even investigate* pro se complaints to the Attorney Grievance Commission.)

Burns v Reed, 500 US 478, 486-487 (1991) stated: "The presumption is that qualified immunity rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," and therefore courts are "quite sparing" in extending absolute immunity. (citations omitted) (Some judges, maybe, but not these. They distribute such immunities liberally and frequently.)

The prosecution and immunity in the lower courts.

The District Court admitted the attorneys prosecuted the case (App C, 10a) but only said a little about the Plaintiff's evidence and affidavits:

> "Plaintiff alleges that the ordinance was void and unconstitutional, that the ordinance was not properly enacted under state law, and that attorneys Leisman and Brown were not authorized to represent the township." (App C, 11a)

The District Court said while granting attorney fees:

"Plaintiff's second objection is merely a

> reiteration of the allegations already reviewed and rejected by this court. Plaintiff persists in accusing his opponents of making false statements to the state circuit court and with having *ex parte* conferences with the judge. He asserts that the defendants 'used unethical and unconstitutional conduct to win the state case.' (Objections at 2)." (App H, 39a)

Plaintiff proved these accusations in his filings and objections, but neither the judge nor magistrate would acknowledge these facts.

The 6th Circuit only admitted that:

> "Kennedy alleged that he was 'wrongfully charged and convicted' of violating a Grattan zoning ordinance. He argued that the ordinance had been repealed, and that Leisman and Brown knew or should have known that the ordinance was void or unconstitutional. He also claimed that: 1) all of the defendants conspired to violate his constitutional rights by 'prosecuting' him pursuant to an invalid zoning ordinance; and 2) defendants Leisman, Brown, and MMBJ were not authorized to act as prosecutors. "(App A, 2a)

Without regard for opposing authority, the magistrate and district court both ruled the private for-profit attorneys have prosecutorial immunity. The convincing opposing arguments should have carried the weight of law and facts on the issue and defeated this immunity at birth.

On appeal, prosecutorial immunity was raised and opposed by Appellant. (See Question #4, p 14) The

attorneys defended by arguing in support of the immunity. But the Court of Appeals cleverly evaded the issue, as it did all the others raised by Appellant. It did not mention the issue in their decision, accept for acknowledging the issue was raised and decided by the magistrate. (App A, 2a) Instead they attempted to affirm that decision by *res judicata,* an issue never raised before. (App A) By refusing to reverse the 6th Circuit has let the prosecutorial immunity stand and be used as precedent by other district courts in the 6th Circuit against all pro se civil rights plaintiffs.

The evidence in the record reveals the private attorneys are hourly paid. That is not disputed. But neither the magistrate nor district court will admit or discuss these facts at all. They have avoided them like the plague, like they do all facts favorable to plaintiff. All are good reasons why this Court should review this issue and this case.

The primary decision on prosecutorial immunity is that of the magistrate. Note the magistrate was granting the attorneys immunity before the Plaintiff even had a chance to respond to the motion to dismiss or have any discovery. The attorneys moved for dismissal and the magistrate ordered a response. (App K, 51a) Plaintiff requested time for discovery and extension of time to respond. The magistrate flew off the handle and falsely contended that he was trying to "extend" time for discovery. (App F, 32a-35a) In doing so he clearly proved his bias in favor of granting the attorneys prosecutorial immunity. (App F, 34a)

In recommending summary judgment and immunity the magistrate's discussion was more extensive. (App E, 24a-27a) But he did not discuss opposing arguments and did not find facts favorable to

the nonmovant as is required in summary judgment even though he knew that is what he was supposed to do. (App E, 24a)

The District Court just touched the issue, but accepted the magistrate's recommendation. (App C, 11a-12a)

The Court should decide whether the pecuniary interest of private for-profit attorneys disqualifies them from immunity.

There is no dispute that the attorneys are private and that they billed hourly for their prosecution of Petitioner, even though the lower courts will not admit it directly. This alone should be sufficient to deny prosecutorial immunity and review this case.

This Court held *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) that: "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an *interest* in the outcome." (emphasis added)

Congress has barred judges from having a financial interest. (Pet. p 2)

> "The framers of section [28 USC] 455 laid down a per se rule where financial interests are concerned, so that even the slightest financial stake in the outcome of litigation—on the part of the judge, his spouse, or minor child—would disqualify the judge." *In re city of Houston*, 745F.2d 925, (1984)

The same should be true of prosecutors. The monetary interest in the proceedings is enough to question whether the official can be unbiased. The

record proves these so called prosecutors were not unbiased in any respect. How could they be? They are for-profit attorneys.

Petitioner is not aware of any case where this Court has held that private attorneys paid by local government and acting as prosecutors have absolute prosecutorial immunity.

This important question is ripe and should be decided now, since the lower courts have ruled they do have prosecutorial immunity. In Michigan there are literally hundreds of these private attorneys acting as prosecutors and doing substantial injustice in the process of profiting from it. It is difficult for pro se litigants to oppose attorneys as it is, and this case has been here once before and it is highly unlikely that another one addressing this issue will be here for a long time, considering the work and expense.

This Court has never held that prosecutors without jurisdiction are absolutely immune.

Proof of jurisdiction is the burden of the plaintiff. The prosecutor has to prove jurisdiction in a criminal case. But here these attorneys knew they did not have jurisdiction and also withheld evidence of lack of jurisdiction so they could win a conviction and feather their own nests by an unconstitutional trial and appeals thereof.

> "And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit." *Dred Scott v Sanford*, 60 US 393, 428 (1857)

Prosecutors who conspire with judges in *ex parte* conferences should not have any immunity either. (See facts and evidence: Doc. #32, p 4, & ref. See Doc. # and Kennedy. Aff's)

The 9th Amendment protects the right of the people to decide who shall be prosecutors and Defendant attorneys do not qualify.

The 9th Am (Pet. p 1) grants rights to the people of Michigan to decide who its leaders are and how they come to office. The Michigan Constitution provides that prosecutors are elected. These attorneys do not meet any condition. It does not include private attorneys.

Michigan Constitution Article VII sec 4 states that a prosecutor is elected in each county. (Pet. p 3) It does not say that Townships may hire any attorney they want. It does not give them any power to prosecute.

The Michigan Constitution is the Supreme Law of the State. The "Supreme Power resides in the body of the people." *Chisholm v Georgia*, 2 US (2 Dall) 419, 457; 1 L Ed 440 (1793) That power should not be overcome.

The attorneys were not elected in Kent County or the Township. In fact, there is no evidence they even live in the Township. Without being elected they cannot be prosecutors in Michigan. Plus they cannot serve two masters - their business and that of the public. The people and Michigan Constitution do not allow it.

The Court can review other cases where attorneys that have been granted broad prosecutorial immunity that are precedents in this and other circuits.

The magistrate stated even prosecutors with evil motives are immune. "The immunity doctrine shields prosecutors even if they act 'maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence.'" (See citations at App E, 26a) This conflicts with the narrow of immunity in *Imbler*.

The 6th Circuit has also apparently held that "attorneys for a municipality who pursue a civil action for public nuisance and ordinance violations are also entitled to absolute immunity 'when their duties are functionally analogous to those of a prosecutor's regardless of whether those duties are performed in the course of a civil or criminal action.'" (See citations at App E, 25a)

Attorneys can even cause the destruction of buildings without compensation in violation of the 5th Amendment and with absolute immunity according to the 6th Circuit. (Id.)

With immunity grants this broad, is any one liable under 42 USC 1983? If all are immune, there is no remedy.

There is great difficulty in enforcing pro se Constitutional rights in the state and federal courts as this case demonstrates and that is another reason to review and reverse.

IV.

ATTORNEY FEES GRANTED AGAINST PRO SE CIVIL RIGHTS PLAINTIFFS NEED STRICT SCRUTINY.

For exercising his 1st & 14th Amendment rights, Petitioner has been hit with almost $10,000 for Defendants attorney fees. (App H, 37a; I, 40a; J, 41a) How does that encourage the enforcement of civil rights in accord with the 14th Amendment command?

Attorney fees hurt the cause of Constitutional rights enforcement. They are punitive and retaliatory as here, to pro se civil rights plaintiffs. *Board of County Commissioners, Wabaunsee County, Kansas v Umbehr*, 135 L Ed 2d 843, 116 S Ct 2342, 2347 (1996) (retaliation for exercise of fundamental rights violates Constitution.)

Attorney fees should be subjected to strict scrutiny because of the fundamental rights at risk. *Rublee v Fleming*, 160 F.3d 223, 217 (5th Cir 1998)

CONCLUSION

The petition for writ of certiorari should be granted on all questions.

Respectfully submitted,

_____ January ___, 2009

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